THE ONTARIO HUMAN RIGHTS CODE,
S.O. 1981, c. 53,
as amended.

IN THE MATTER of the complaint made by Martin Rapson of Toronto, Ontario, alleging discrimination in employment by Stemms Restaurants Limited and Mr. Constantin (Gus) Sipsis.

BOARD OF INQUIRY

Professor Carol Rogerson

Appearances:

Ms. Joanne Rosen	-	Counsel for the Ontario Human Rights Commission
Mr. Robert Statton	-	Counsel for the Respondents, Stemms Restaurants Limited and Constantin (Gus) Sipsis

REASONS FOR DECISION

INTRODUCTION

This inquiry involves a complaint made by Martin Rapson (the "complainant") against Stemms Restaurants Limited and Constantin (Gus) Sipsis (the "respondents") dated September 25, 1986 alleging that his right to equal treatment in employment was infringed on the ground of handicap contrary to ss. 4(1) and 8 of the Ontario Human Rights Code, 1981, S.O. 1981, c. 53 when his employment as a bartender with the respondents was terminated because of his epilepsy. Handicap is expressly defined in s. 9(1)(b) of the Code to include epilepsy. I was appointed to serve as a Board of Inquiry by the Minister of Citizenship on March 5, 1990. Six days of hearings were held in Toronto on April 24, June 11, September 26, and October 17, 18 and 31, 1990.

I should state at the beginning that this has been a most difficult and trying case. As will be apparent from a reading of the transcript, counsel for the respondents, Mr. Statton, made no effort to facilitate the hearing of this matter and indeed has at every step of the way thwarted and delayed these proceedings. The ostensible explanation for this attitude, and one voiced many times during the course of the proceedings by Mr. Statton, was a sense of grievance arising from the unfair manner in which the Commission handled the investigation of the complaint prior to my appointment as a Board of Inquiry. He emphasized in particular the failure of the Commission to provide adequate disclosure of the case against the respondents and the undue delay in bringing

the matter before a Board of Inquiry.

Whether or not these complaints respecting the unfairness of the Commission's procedures are legitimate is not for me to decide. The evidence required to make such a ruling was not before me and, more importantly, as a Board of Inquiry appointed pursuant to s. 37(1) of the Code to hear and decide a complaint I lack the jurisdiction to deal with that issue. The Divisional Court is the appropriate forum for review of the Commission's conduct.

Regardless of the legitimacy of Mr. Statton's complaints, however, the animosity against the Commission which was generated during the investigation of the complaint very much coloured the proceedings before the Board of Inquiry. Mr. Statton essentially took the attitude throughout the proceedings that the system established under the Code for dealing with violations of human rights was an unfair system which constituted an illegitimate departure from both the substantive and procedural rules of common law; and he voiced his objections at every opportunity during the proceedings. Refusing to acknowledge the compensatory purpose of human rights legislation, as articulated by the Supreme Court of Canada itself in such cases as Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. (1985) C.H.R.R. D/3102, Mr. Statton insisted on treating the proceedings

as criminal or quasi-criminal in nature and his clients as thus entitled to the full range of protections accorded the accused in criminal proceedings.

Finally, perhaps because of his lack of respect for the human rights system, Mr. Statton failed to bring forward or rely upon any case law, be it decisions of Boards of Inquiry or courts, interpreting and applying the Code. As a result of Mr. Statton's inadequate preparation, I was not provided with the assistance that I might have been in dealing with the legal issues raised by this case. I would like, on the other hand, to thank counsel for the Commission for her thorough and careful preparation and her assistance in facilitating the proceedings.

Having thus provided some sense of the context in which these proceedings took place, I will begin by dealing with the preliminary issues which arose and then move on to discuss the merits of the complaint itself.

PRELIMINARY ISSUES

a) Parties to the Proceeding

An initial issue arose with respect to the proper parties to the proceeding before the Board of Inquiry. Two respondents were named in the complaint: Gus Sipsis and Stemms Restaurants

Limited.[1] Gus Sipsis was the manager of the restaurant in which the complainant had been employed as a bartender and was also a treasurer of the corporation, Stemms Restaurants Limited. In his capacity as manager Mr. Sipsis was responsible for the hiring and supervision of employees. The complainant alleged that Mr. Sipsis was personally responsible for the termination of his employment. Stemms Restaurants Limited was named as a respondent on the basis of its vicarious liability for the acts of its officer and employee, Gus Sipsis, pursuant to s. 44(1) of the Code.

After the appointment of the Board of Inquiry it came to light that the assets of the corporation, including the restaurant, had been sold in 1988 and that the corporation had instituted dissolution proceedings in 1989. Both Mr. Statton and Mr. Basilli Kanellopoulous, who was identified as the president and secretary of the corporation and who had been served with notice of the proceedings, expressed their understanding that the dissolution of the corporation had been finalized. The issue thus arose of whether the corporation was a proper party to the proceeding. A corporate search conducted by the Commission after

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[1] In the complaint itself the corporate respondent was named as Stemms Restaurant Ltd. A subsequent corporate search revealed that the correct name was Stemms Restaurants Limited. Counsel for the Commission requested an amendment of the complaint, which I allowed and which will be discussed below.

the appointment of the Board of Inquiry clarified the situation by revealing that articles of dissolution had not been filed. Thus, although the process of dissolution had been commenced, it had not been completed. The corporation continued to exist as an entity as of the date of commencement of proceedings and I thus concluded that it was properly a party to the proceedings.

Furthermore, by virtue of s. 241(1) of the Business Corporations Act, S.O. 1982, c. 4 as amended by S.O. 1986, c. 57 and c.64 s. 3, the result would not have been any different had the corporate respondent been dissolved as of the date of the commencement of these proceedings. Section 241(1) provides for the continuation of proceedings instituted against a corporation prior to its dissolution, as well as for the commencement of new proceedings within five years of the dissolution of the corporation. The section reads as follows:

241. - (1) Notwithstanding the dissolution of a corporation under this Act,

(a) a civil, criminal or administrative action or proceeding commenced by or against the corporation before its dissolution may be continued as if the corporation had not been dissolved;

(b) a civil, criminal or administrative action or proceeding may be brought against the corporation within five years after its dissolution as if the corporation had not been dissolved; and

(c) any property that would have been available to satisfy any judgment or order if the corporation had not been dissolved remains available for such purpose.

Because Stemms Restaurants Limited had been given only one day's notice of the commencement of these proceedings, an adjournment was required to allow Mr. Kanellopoulous to assess the situation and seek counsel. Mr. Statton, who had represented the corporation in the prior investigation of the complaint and who had initially appeared before the Board of Inquiry as representing only Mr. Sipsis individually, was chosen by Mr. Kanellopoulous to represent Stemms Restaurants Limited as well.

b) <u>Amendment of Complaint</u>

The respondents were originally named in the complaint as Gus Sipsis and Stemms Restaurant Ltd. The corporate search conducted by the Commission revealed that Mr. Sipsis' proper name was Constantin and that the correct legal name of the corporation was Stemms Restaurants Limited. Counsel for the Commission brought a motion to amend the complaint accordingly. Counsel for the respondents objected to the amendment with respect to the name of the corporation. He argued that as the word "Limited" in the corporation's name had been spelled out in full in the respondent's questionnaire (exhibit 7) dated May 26, 1987, the Commission had had notice of and failed to correct its error for

three years and thus should no longer be able to sustain proceedings against the corporation.

Following the interim decision of Professor Cumming in Bahjat Tabar and Chong Man Lee v. David Scott and West End Construction Limited (1982), 3 C.H.R.R. D/1073, I allowed the amendment of the complaint to reflect the proper legal names of the respondents. The requested amendments constituted, in my view, minor corrections that involved no prejudice to the respondents as they were both aware of the complaint from the beginning and knew that they were the entities against whom the complaint had been brought. I noted, as well, that in the documents of which the Commission had notice, the corporation's representatives themselves had not always used the corporation's correct legal name. In the respondent's questionnaire, for example, the respondent was identified as Stemms Restaurant Limited (with no "s" on the word "Restaurant"). In the letter of recommendation written by Gus Sipsis for Martin Rapson (exhibit 9, tab 4) the corporation is identified as Stemms Restaurant Ltd. (with no "s" on the word "Restaurant" and "Limited" abbreviated as "Ltd.").

c) Disclosure

The most difficult preliminary matter raised was with

respect to the issue of disclosure. As indicated earlier, Mr. Statton felt aggrieved at the absence of disclosure from the Commission during the investigation of the complaint prior to the appointment of the Board of Inquiry. He argued at the commencement of the Board of Inquiry that because of the absence of disclosure his clients had been prejudiced in the preparation of their case. Counsel for the Commission undertook to provide Mr. Statton, prior to the next scheduled hearing date, with the relevant documents in the Commission's files, and with the names of the witnesses that the Commission intended to call together with brief summaries of their evidence. In a subsequent letter to Mr. Statton dated May 17, 1990 clarifying the arrangements for the next scheduled hearing, I requested that Mr. Statton make known to myself and counsel for the Commission any preliminary matters which he wished to raise in order to facilitate the scheduling of the hearing.

In accordance with her undertaking, counsel for the Commission provided disclosure to Mr. Statton. In disregard of my request for prior notice of preliminary issues, Mr. Statton raised no objection to the adequacy of the disclosure with myself or counsel for the Commission prior to next hearing. Assuming that no further preliminary issues remained and that disclosure was satisfactory, counsel for the Commission scheduled witnesses to appear at the hearing. It was only at the beginning of the

hearing that Mr. Statton raised the issue of his dissatisfaction with the disclosure provided by the Commission.

It would certainly have been open to me to refuse to hear Mr. Statton on the preliminary issue of disclosure in light of his breach of my request, conduct verging on contempt of the Board. Such, indeed, was the response advocated by counsel for the Commission who was concerned with any further delay in the proceedings. However, in light of the past history of the case and the allegations of unfairness raised, and in order to have no doubt cast upon the fairness of the proceedings before the Board of Inquiry, I allowed Mr. Statton to raise his objections with respect to the disclosure with which he had been provided.

After the presentation by Mr. Statton of many vague allegations, three major deficiencies with respect to disclosure from the respondents' point of view were eventually identified:

a) medical information with respect to the complainant's medical condition at the time of his employment with the respondents;

b) further information with respect to mitigation of damages; and

c) further information with respect to the loss of confidence and depression alleged by the complainant as the effects of the termination of his employment.

The first and third issues were easily dealt with. The Commission had provided the respondents with a medical report prepared by the complainant's neurologist which the Commission planned to produce in evidence. I concluded that this constituted adequate disclosure with respect to the issue of medical history. With respect to the complainant's alleged loss of self-confidence and depression which would constitute the basis of his claim for general damages, the Commission had disclosed to the respondents its intention to call Mr. Rapson as a witness and had also disclosed a summary of his evidence to the effect that the termination effected his self-esteem and that he suffered from a loss of confidence and feelings of depression. Having clarified with counsel for the Commission that no other evidence beyond the testimony of the complainant would be led to establish mental anguish, I ruled that the disclosure with respect to that issue had been adequate. I indicated that Mr. Statton's continuing objections to the disclosure with which he had been provided reflected a concern with the adequacy of the evidence rather than the adequacy of the disclosure.

It was the respondents' request for additional disclosure of information relating to the complainant's efforts at mitigation of damages which to my mind raised a serious issue. Counsel for the Commission had provided the respondents with a summary of the evidence Mr. Rapson would give to the effect that he looked at bars and restaurants to secure employment after his employment with Stemms Restaurant was terminated. The date on which he found subsequent employment and its nature were also provided. Mr. Statton argued that adequate disclosure would require provision of a list of the establishments at which the complainant had applied for subsequent employment. Counsel for the Commission objected to the disclosure requested.

Disclosure in proceedings before a Board of Inquiry appointed pursuant to the Human Rights Code is governed by s. 8 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484 (hereinafter the S.P.P.A.) which provides as follows:

> "Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto."

In objecting to the respondents' request for information relating to the establishments at which the complainant had applied for employment, counsel for the Commission made two arguments. First, she relied upon the interim decision of Board

Gorsky in Walbar Machine Products of Canada Limited v. Ontario Human Rights Commission (1980) 1 C.H.R.R. D/228 (Ont. Bd. of Inquiry). In interpreting s. 8 of the S.P.P.A., the Board drew a distinction between disclosure of the material facts relied upon with respect to an issue (which is required by s. 8) and disclosure of the evidence by which it is intended to establish those facts (which is not required by s. 8). Ms. Rosen argued that the information requested by the respondents fell into the latter category of evidence and thus did not have to be disclosed. Her second argument was that no disclosure of information relating to mitigation of any sort was required as the issue fell outside the express terms of s. 8 which provides for disclosure only when issues are raised relating to the "good character, propriety of conduct or competence of a party".

Feeling that the issue was a serious one and having some sympathy for the respondents' argument that they required the information in issue in order to respond to the complaint and prepare their case, I indicated to the parties that I would require further submissions before making a ruling. In the interests of facilitating the proceedings, and without conceding the existence of any obligation on the part of the Commission to provide disclosure of such information, counsel for the Commission agreed to provide the respondents with the list of restaurants and bars to which the complainant recalled applying

for employment. An adjournment was then required to allow the respondents to utilize that information in the preparation of their case.

DELAY

In his legal argument at the conclusion of the hearing, counsel for the respondents argued that I should dismiss the case because the long delay between the filing of the complaint and the appointment of the Board of Inquiry made a fair hearing impossible. As was noted earlier, the complaint was filed in September of 1986 (the events giving rise to the complaint having occurred between October 1985 and January 1986) and a Board of Inquiry was appointed in March of 1990, some three and a half years later. While Mr. Statton voiced general concerns with the effect of the passage of time on the memories of those involved and the difficulties of establishing with any degree of certainty the factual basis of the complaint, it was clear that his main concern was the effect of delay on the respondents' ability to prepare that part of the case relating to mitigation. Here Mr. Statton drew once again on his earlier complaints with respect to non-disclosure during the investigation of the complaint. He argued that because disclosure of the particulars of the complainant's efforts at mitigation was not provided until the appointment of the Board of Inquiry, some four years after the

events in issue took place, it had become impossible for the respondents to verify those particulars.

There is no doubt that the concerns raised by Mr. Statton with respect to the delay in the hearing of this matter are serious concerns, especially as this is a case in which the major issues are factual rather than legal. The fact that memories had faded became apparent through the course of the hearing. I was troubled at many points with the inability of witnesses to remember crucial events with any specificity and even more with the inability to trace witnesses who might have been able to corroborate one version or another of the conflicting stories which were presented in evidence.

In the end I have concluded, however, that a dismissal of the case would be too drastic a response to the concerns raised by the respondents with respect to delay. To dismiss the case would be to ignore entirely the important purposes of the Code and the right of the complainant to have his complaint of alleged discrimination heard. A more appropriate response is that the effects of the passage of time be taken into account in assessing the evidence. It must be remembered that the onus is on the complainant to establish, on the balance of probabilities, that an act of discrimination has occurred. If the evidence is insufficient, the complaint will fail. There is also an onus on

the complainant to prove his damages. Again, if the evidence is inadequate, damages will not be awarded.

With respect to the respondents' specific concern that the delay made it impossible for them to prepare that aspect of their case questioning the reasonableness of the complainant's attempts to mitigate damages, it is clear that the passage of time has made it virtually impossible to verify the particulars of the complainant's job search. The evidence established that employment applications of this sort are rarely kept on file for more than six months or a year.

On this point, I would like to note a disturbing lack of consistency on the part of the respondents which casts some doubt on the sincerity of their argument. As part of his evidence-in-chief Mr. Sipsis recounted the results of his recent visits to the bars and restaurants named by the complainant. His evidence was clearly intended to suggest that the various establishments contacted kept applications on file going back to 1986 and that a search of these files turned up no applications from the complainant. It was only established in cross-examination that the restaurants and bars in question did not have any applications going back to 1986 on file.

Later, in his legal argument, Mr. Statton did refer to the

"farce" of attempting to verify the complainant's job applications, but I would note that it was a farce in which the respondents readily chose to engage before the Board of Inquiry in the hope that doubt would thereby be cast upon the credibility of the complainant's story. The respondents' position would have been strengthened had they maintained consistently that it was impossible to verify the complainant's subsequent job applications because of delay and the passage of time.

In addition, I agree with counsel for the Commission who argued that there are other avenues available to attempt to test the endeavours of a complainant to mitigate damages. These would include the use of general evidence relating to the state of the job market at the relevant point in time and cross-examination of the complainant. In fact, as will become apparent from my disposition of the complaint, Mr. Statton was very effective in using the means available to him in establishing the weaknesses in the complainant's case with respect to mitigation.

THE FACTS

It became apparent in the course of the hearing that the main issues in dispute between the parties were factual rather than legal. The stories of the complainant and the respondents with respect to the events giving rise to the complaint differed

significantly and the issue of credibility thus became central.

The complainant, Martin Rapson, is an epileptic. He experienced his first seizure when he was about 13 years of age and has since then been taking anti-convulsant medication to control the seizures. The medical evidence relating to Mr. Rapson's epilepsy will be reviewed in much greater detail below as it relates to the legal issue of whether Mr. Rapson was capable, despite his epilepsy, of fulfilling the responsibilities of his job as bartender at Stemms Restaurant. Suffice it to say at this point, that on average Mr. Rapson has over an extended period of time experienced seizures once every year or two years and has, in fact, not experienced a seizure since 1986.

Mr. Rapson graduated from McMaster University in 1984 with a Bachelor of Arts degree in political science. While pursuing his education he worked during the summers, first for a paving company and then for a mining company. He testified that in each case, given the nature of the employment, he had informed his employers of his epilepsy. After graduating from university, Mr. Rapson worked for several months as a night manager for the T. Eaton Company and then departed in January of 1985 for an extended period of travel through Europe. While travelling Mr. Rapson experienced a seizure in approximately May of 1985. Mr. Rapson returned to Toronto in August of 1985 and, having largely

depleted his finances, commenced a search for employment. At that point Mr. Rapson was living with his girlfriend's parents, but understood the arrangement to be a temporary one until he found employment and was able to afford his own apartment.

There is relatively little disagreement between the parties with respect to the initial sequence of events giving rise to the complaint. Mr. Rapson applied to Stemms Restaurant,[2] which was in his neighbourhood, for work as a bartender at about the beginning of October 1985. He was subsequently hired and commenced employment on October 29, 1985. He did not inform Gus Sipsis, the manager of the restaurant and the person who was responsible for hiring him, of his epilepsy. When asked why, Mr. Rapson replied in testimony that he knew he was not required to do so pursuant to the Human Rights Code, and also that he thought it might jeopardize his chances of employment.

Mr. Rapson did not have a great deal of experience as a bartender and Mr. Sipsis helped to train him. There appeared to be a good working relationship between Mr. Rapson and Mr. Sipsis. The respondent's questionnaire (exhibit 7), filed during the prior investigation of the complaint, contained the allegation that "the complainant was not a reliable employee and did not

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[2] The actual name of the restaurant was Stemms Eatery. Throughout the proceeding it was referred to as Stemms Restaurant and I have done the same.

perform his duties in a competent manner. He had a pattern which included, not coming to work, having epileptic problems at work and with performing the duties of a bartender without breakage". However, except for the one occasion, which will be described below, on which Mr. Rapson experienced a seizure at work, these allegations of Mr. Rapson's inadequacies as an employee were not supported by any evidence presented during the hearing, either by the Commission or the respondents. All of the evidence supports the conclusion that Mr. Rapson was a conscientious, competent employee who took his job seriously. There was no evidence that he failed to appear for work or was late for work. There was no evidence that he was responsible for the breakage of any glasses. There was no evidence of any complaints made about Mr. Rapson's performance of his duties by either his employers, his co-workers or customers.

On Friday, November 29, 1985 Mr. Rapson experienced an epileptic seizure while at work. Early in the evening, while Mr. Rapson was behind the bar, he experienced an aura, a feeling of vertigo which indicated to him that he might experience a seizure. He tried to make his way to the kitchen because he thought it would be the safest place to be if he were to have a seizure and also so as not to upset the customers in the restaurant. At that point Mr. Rapson lost consciousness and fell upon Mr. Sipsis, who was also behind the bar. Mr. Sipsis helped

Mr. Rapson into the kitchen and laid him down on the floor. Operating on the basis of a common misunderstanding as to the needs of an epileptic during a seizure, Mr. Sipsis placed a spoon in Mr. Rapson's mouth to prevent him from swallowing his tongue. As a result, Mr. Rapson experienced a chipped tooth.

Although judged in light of current medical knowledge Mr. Sipsis' response to Mr. Rapson during the seizure may not have been ideal, there is nothing in the evidence to support any criticism of Mr. Sipsis' actions. Mr. Sipsis acted in good faith and out of concern for Mr. Rapson. On the basis of his own knowledge of epilepsy, gained from experience with a relative in Greece who suffered from epilepsy, Mr. Sipsis acted to provide what he believed was appropriate care during a seizure. On this point I give little weight to the evidence of Annie McKay, a co-worker who witnessed Mr. Rapson's seizure, in which she suggested that Mr. Sipsis should be faulted for using too much force in responding to the seizure.

After Mr. Rapson regained consciousness, about 45 minutes later, Mr. Sipsis arranged for another employee to accompany Mr. Rapson home in a taxi. Mr. Rapson returned to work the next day, which was a Saturday, for his next regularly scheduled shift. As a result of the seizure Mr. Rapson suffered a few bumps and a chipped tooth because of the spoon Mr. Sipsis placed in his

mouth. No glasses were broken in the bar area, and no customers or co-workers were injured.

Up until Mr. Rapson's seizure of November 29, 1985 the stories of the complainant and respondents are essentially consistent. They diverge significantly, however, with respect to the events which followed the seizure. According to Mr. Rapson's testimony, subsequent to the seizure there were no discussions between himself and Mr. Sipsis with respect to his epilepsy save for Mr. Rapson reassuring Mr. Sipsis, on the day following the seizure, that he felt fine and possibly apologizing for the trouble he had caused. More specifically, Mr. Rapson testified that he was never at any point after the seizure asked by Mr. Sipsis for either a doctor's letter or any sort of letter of indemnity or told that if he did not provide such letters his employment would be terminated. According to Mr. Rapson, after the seizure his employment continued uneventfully until January 7, 1986 when, upon reporting for work, he was called into the office and told by Mr. Sipsis that his employment was terminated. Mr. Rapson was told that he was a good worker but that because he was an epileptic he was not suitable for the job. He was told he could work for a few more days and he worked until January 9.

According to Mr. Rapson, during his January 7 meeting with Mr. Sipsis in which he was told his employment was terminated, he

asked Mr. Sipsis to write him a letter of recommendation, given that Mr. Sipsis had told him he was a good worker. Mr. Sipsis agreed, but suggested that because of his difficulties with writing English Mr. Rapson should write the letter and he would sign it. Mr. Rapson insisted that Mr. Sipsis write the letter himself. Mr. Rapson testified that he was not present when the letter was written and that he was given the letter when he picked up his last pay. The letter (exhibit 9, tab 4), dated January 8, 1986 reads as follows:

> TO WHOM IT MAY CONCERN
>
> Mr. Marty Rapson is an employee of ours, but we have to let him go as of January 9, 1986 as he is an epileptic. He is a good worker, but working with glassware etc and him being an epileptic, we feel this is not a suitable job for him.
>
> Yours truly,
> STEMMS RESTAURANT LTD.
>
> ms G. Sipsis

Mr. Rapson testified that because the letter mentioned his epilepsy he never used it in seeking subsequent employment.

The complainant's version of how his employment at Stemms Restaurant was terminated, i.e. that he was fired because his

employer felt that his epilepsy made him unsuitable for the job, is supported by the record of employment (exhibit 9, tab 5) filed by Stemms Restaurants Limited with Employment and Immigration Canada after Mr. Rapson had ceased employment. The form is dated January 22, 1986 and is signed by "M. Smither" who was then the secretary in the head office in Brampton. In the section of the form dealing with the reasons for the issuing of the record, the box checked was not "quit" but rather "other", and "not suitable" was typed in as the explanation.

The respondents' version of the events following the seizure stands in stark contrast to that of the complainant. On their version of the facts, commencing on the day Mr. Rapson returned to work after the seizure, Mr. Sipsis repeatedly asked Mr. Rapson for a letter from his doctor indicating that he was fit to work. Mr. Rapson failed to respond to these requests; according to Mr. Sipsis' testimony Mr. Rapson simply said nothing each time such a request was made and became somewhat embarrassed. Evidence was given both by Mr. Sipsis and Mr. Kanellopoulous to the effect that it was standard practice in the restaurant business to require an employee who had been off work because of illness to produce a doctor's letter before being allowed to return to work. Such a letter is requested, they said, both to ensure that the employee is capable of returning to work and doing the job, and also to provide information about any special assistance that

should be provided to the employee.

After Mr. Rapson ignored Mr. Sipsis' request to provide a doctor's letter, Mr. Sipsis allegedly made an additional or alternate request that Mr. Rapson provide some sort of letter of indemnity from his parents or guardians exempting the restaurant from liability if Mr. Rapson were to injure himself at work during a subsequent seizure. The evidence with respect to this alternate request was somewhat vague and confused and Mr. Sipsis acknowledged during cross-examination that his primary concern was with a doctor's letter.

According to the respondents' version of the facts, Mr. Sipsis eventually became frustrated because Mr. Rapson was not complying with his requests and on January 3 he gave Mr. Rapson two weeks notice unless he provided the doctor's letter or letter of indemnity. On January 6, however, before the two week notice period had expired, Mr. Rapson told Mr. Sipsis that he was "fed up" and that he was quitting. The next day Mr. Rapson asked Mr. Sipsis, as a favour to him, to engage in a deception by writing a letter stating that he had been fired because of his epilepsy. Such a letter would allow him, he explained, to claim unemployment insurance. Mr. Sipsis, who felt sorry for Mr. Rapson and wanted to help him, agreed to write the letter. Because Mr. Sipsis had difficulty with English, he asked Mr.

Rapson to tell him what to put in the letter. Mr. Rapson then dictated the terms of the letter, which Mr. Sipsis in turn communicated over the telephone to the secretary in the head office. According to Mr. Sipsis' testimony, Mr. Rapson picked up the letter the next day and upon opening it in Mr. Sipsis' presence said that it was fine.

With respect to the record of employment (exhibit 9, tab 5) which indicates, contrary to the respondents' story, that the reason for the termination of Mr. Rapson's employment was not that he quit but that he was "not suitable", Mr. Sipsis testified that he was not responsible for filling out the form, and that it had been filled out by someone at the head office. He testified that he himself had written "quit" on Mr. Rapson's last pay slip which had been sent to the head office.

The main evidence supporting the respondents' version of events was the testimony of Mr. Sipsis. There was some corroboration provided by Mr. Kanellopoulous who testified that Mr. Sipsis had discussed with him Mr. Rapson's seizure and the subsequent request to provide a doctor's letter. In addition, Mr. Sipsis' testimony was supported by documentary evidence in the form of a series of handwritten, dated notes (exhibit 16) made by Mr. Sipsis relating to Mr. Rapson's seizure and the subsequent events. Mr. Sipsis testified that the notes were

prepared on the dates shown on the notes, i.e. contemporaneously with the events being described. He testified that it was his practice to take notes about any problems which arose in the restaurant; that the notes were kept in small spiral notebooks or note pads; and that the notes relating to Martin Rapson had been removed from their original notebooks in the course of preparing for the hearing. Mr. Sipsis also introduced into evidence the notepads from which the notes relating to Mr. Rapson were removed (exhibit 19). Mr. Sipsis testified that he kept notes on other employees, in addition to Mr. Rapson. Some notes relating to another employee, Annie McKay, who was called as a witness by the Commission, were introduced into evidence (exhibit 18).

I was thus offered two quite different versions of the facts on which the complainant is based, with some documentary evidence supporting each. On the complainant's version of the facts, he was fired approximately five weeks after experiencing an epileptic seizure at work because his employers believed that his epilepsy made him unsuitable for the job of bartender. And furthermore, his employers straightforwardly acknowledged this in the letter of recommendation they wrote for him and in the record of employment that was filed with the government upon his termination.

On the respondents' version of the facts, the complainant

had been given notice of termination of his employment not because of his unsuitability for the job but because of his insubordination -- his failure to comply with his employer's request to provide a doctor's letter following his seizure. And furthermore, the complainant actually quit prior to the expiry of the notice period rather than being fired. The so-called letter of recommendation in which Mr. Sipsis acknowledged that the complainant's epilepsy was the reason for his termination is explained as a deliberate deception engaged in by Mr. Sipsis as a favour to the complainant, and indeed with his active assistance. The failure of the record of employment to indicate that the complainant quit is explained as an administrative decision by head office.

Very different legal consequences flow depending upon which set of facts is accepted. If the complainant's version of events is believed, the legal issue which arises is the relatively straightforward one of whether the respondents were justified in firing the complainant because of his epilepsy. The respondents' version of events, if believed, gives rise to much more complex legal issues of whether an employer's demand for a doctor's letter confirming a handicapped employee's suitability for employment can constitute discrimination and whether an employee's decision to quit in the face of such a request can be considered a constructive dismissal.

The issue of credibility is central to the determination of this complaint. Which of the two stories is the more credible? In determining the issue of credibility in this case I have been guided by the decision of the British Columbia Council of Human Rights in Blair v. Progressive Products Limited (1989), 11 C.H.R.R. D/130 in which the tribunal was required to determine an issue of credibility of witnesses arising in the context of a complaint of sexual harassment. The tribunal sought guidance from the tests articulated in Faryna v. Chorny [1952], 2 D.L.R. 354 (B.C.C.A.) at 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Applying the test from Faryna v. Chorny, that of which story is most consistent with the preponderance of probabilities in the case as a whole, I have come to the conclusion that the complainant's story is on the whole the more credible and is in most instances to be preferred to that of the respondents. I should note that this conclusion was not easily reached. This

was a case where each version of the facts was compelling in some aspects and unsatisfactory in other aspects.

The complainant's story has the strength of being straightforward and consistent. It is supported by the documentary evidence in the form of the letter of recommendation and the employment record. On the complainant's version of events these documents can be taken at face value: no complicated explanations are required to explain why they say something different from what really happened. Evidence led during the hearing could certainly provide an explanation for the dismissal of Mr. Rapson because of his epilepsy. The evidence established that Mr. Sipsis cared very much about his business. It is certainly conceivable that he might have been worried about the effect of Mr. Rapson's epilepsy on the business, either because of adverse reactions by customers or financial liability if Mr. Rapson were injured during a seizure.

What the complainant's story does not provide is a completely satisfactory explanation for the delay between his seizure and the termination of his employment. One is left to speculate that Mr. Sipsis may not have wanted to deal with the situation until after the Christmas holiday period. The question also remains of why Mr. Sipsis would have been willing to openly acknowledge in a letter of recommendation that he had terminated

the complainant's employment because of his epilepsy. Again, one is left to speculate that if Mr. Sipsis believed that the decision to terminate Mr. Rapson's employment was completely reasonable and justifiable, he might have had no hesitancy in openly acknowledging the basis for his decision.

The complainant conveyed a strong impression of someone who was pursuing his complaint as a matter of principle, in order to insist upon the recognition of his right and those of other epileptics to be free of discrimination. His testimony remained consistent throughout the proceeding, and no doubts were cast upon his credibility in that respect. Concerns about his evidence, to the extent that they exist, arise more because of what was not said, rather than what was. In recounting his version of events, the complainant was not always as forthcoming with details as one might have wished, whether because of fading memory, nervousness or personal style. The result is a story that is essentially credible, but not as complete as it might be.

Aspects of the respondents' story also appear believable, at least on first impression. The main strength of the respondents' version of events is that it explains the delay between the seizure and the termination of Mr. Rapson's employment. It is not improbable that an employer would request a doctor's letter in a case where an employee has experienced an epileptic seizure

in the workplace in order to determine, for example, how often the seizures occur and the degree to which the employee's epilepsy might interfere with his or her ability to perform the job.[3] The request for a letter of indemnity from Mr. Rapson's parents or guardians also seems to be plausible in the circumstances. It is the kind of protection that a small businessman like Mr. Sipsis, who has had little formal education and lacks a sophisticated knowledge of law, might seek if he were worried about exposure to liability for an employee's injuries on the job.

Although aspects of the respondents' story, taken in isolation, have some plausibility, when the totality of the evidence in the case is examined, it becomes apparent that the respondents' evidence is too riddled with inconsistency and places too much of a strain upon one's sense of the realities of life to have credibility. As well, in some instances the respondents' evidence was obviously misleading, which cannot but cast doubt upon the credibility of their evidence as a whole. I am well aware that some of the inconsistencies and other inadequacies in the respondents' evidence, particularly that of

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[3] The issue of whether such a request would be considered reasonable under the Human Rights Code and not discriminatory is, of course, a separate issue and one that need not be dealt with in this case given my finding on the facts that no request for a doctor's letter was made.

Mr. Sipsis, may be the product of language difficulties. But even taking those difficulties into account, and treating the respondents' evidence with a degree of leniency, I am left with serious misgivings about the overall credibility of the respondents' evidence.

The respondents' version of events, when looked at in its entirety, leaves unanswered too many questions. First of all, why would Mr. Rapson have refused a request for a doctor's letter if such a request had been made? The evidence established that he was a conscientious employee. He also needed money, and had in fact committed himself to moving into his own apartment, which would entail additional expenses. This evidence suggests that Mr. Rapson would have wanted to retain his current employment and would have been willing to comply with his employer's requests. In addition, Mr. Rapson also knew that his epilepsy was under control and that a doctor's letter would be supportive of his continued employment.[4]

It is, of course, possible to think of reasons why Mr. Rapson might not have complied with Mr. Sipsis' requests had such requests been made. He might have viewed them as unreasonable,

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[4] This point will be established in the review of the medical evidence, below. The respondents' contention that a doctor's letter in December of 1985 would have indicted that Mr. Rapson was unsuitable for employment is not supported by the medical evidence.

given what he knew about his own condition. He might have reacted to such requests as a form of harassment directed at him because he was an epileptic. However, given my impression of Mr. Rapson as someone who was pursuing his complaint as a matter of principle to assert his right as an epileptic to be free from discriminatory treatment, I believe that if he had been subjected to requests for letters which he felt were discriminatory, he would have based his complaint on those grounds.

A second problem with the respondents' story is the improbability of Mr. Rapson's request for a letter, given what the respondents allege to have occurred prior to that request. If Mr. Rapson indeed quit on January 6 because he was "fed up", it is likely that there would have been bad feelings between Mr. Rapson and Mr. Sipsis. It does not make sense, in these circumstances, that Mr. Rapson would have continued to work for a few more days or that he would have asked Mr. Sipsis the next day for a favour in the form of a false letter to facilitate his claim for unemployment insurance.

A final difficulty with the respondents' story in terms of its fit with the totality of evidence in the case is its inconsistency with two of the major pieces of documentary evidence, the so-called letter of recommendation and the record of employment. Both of these documents indicate that Mr.

Rapson's employment was terminated because his employers believed he was unsuitable for the job, and the letter explicitly states that he was fired because of his epilepsy. A complicated explanation is required to explain the discrepancies between these documents and the respondents' story. In the case of the letter of recommendation, that Mr. Sipsis wrote a false letter as a favour to Mr. Rapson in order that he might claim unemployment insurance. In the case of the record of employment, that for some unknown reason the secretary responsible for completing the form did not fill it out in accordance with the final pay slip sent in by Mr. Sipsis.

Admittedly, unusual things do happen; forms and letters cannot always be taken at face value. In a case where the respondents' evidence was otherwise completely credible these explanations might carry more weight. However, in a case such as this, where there are several instances of inconsistent and misleading evidence which cast serious doubt on the credibility of the respondents' story, these explanations begin to seem less than probable.

One of the main pieces of evidence corroborating the respondents' story is the series of notes written by Gus Sipsis which document his dealings with Martin Rapson (hereinafter the Rapson notes). In the end, the respondents' use of this evidence

detracted from their credibility rather than enhancing it. Mr. Sipsis testified that these notes were made on the dates indicated on them, i.e. contemporaneously with the events described in the notes. However, careful examination of the notes themselves, together with the notepads from which they were allegedly removed, can only lead to the conclusion that the notes relating to Martin Rapson were not made at the time the events occurred, but at some later date.

The neatness and uniformity of the handwriting and the amount of detail contained in the Rapson notes is in stark contrast to the notes in the intact notebooks. This alone suggests that the Rapson notes were not written one by one as the events described therein occurred, but instead that they were all written at the same time and in a period of reflection removed from the events themselves.

Furthermore, it is suspicious that the notes in the intact notepads were all food orders -- there were no other notes respecting employees. When questioned about this, Mr. Sipsis explained that he had removed all of the notes relating to employees and only brought to the hearing those he thought relevant, i.e. those relating to Martin Rapson and Annie McKay. Further questioning revealed the weaknesses in this explanation. At some points in his testimony Mr. Sipsis seemed to suggest that

he still had in his possession other notes about employees that had been removed from the pads, but that he had not been told to bring them to the hearing (transcript, Vol. 5, pp. 135-6). However, if the respondents had been serious about establishing the veracity of these notes, one would have expected any other notes relating to employees to have been submitted to bolster their case.

At another point in his testimony Mr. Sipsis offered another explanation of how he dealt with notes relating to employees. He stated that he reviewed the notes weekly and would dispose of the notes as the problems with particular employees were resolved (transcript, volume 5, pp. 134-135). This latter explanation, if true, raises the question of why the notes relating to Mr. Rapson were kept given that Mr. Rapson's employment ceased on January 9, 1986. Mr. Sipsis had no reason to believe that there would be any continuing problems and the letter from the Commission informing the respondents of the complaint was not sent until February 10, 1987 (exhibit 8). Furthermore, the inconsistency between the two explanations of how he dealt with the notes casts doubt upon the credibility of anything the respondents might say about the notes.

Finally, further doubt is cast upon the respondents' claim that the notes were made on the dates indicated on them by the

fact that they did not appear until this hearing. They were not produced during the prior investigation of the complaint by the Commission in the face of an explicit request in the respondent's questionnaire to provide any relevant documentation. I can only conclude that the notes were created in anticipation of the proceedings before the Board of Inquiry.

A conclusion that the notes were not made contemporaneously with the events they describe does not necessarily mean that the events in issue did not occur as described in the notes. The notes, although created for the purposes of this hearing, could indeed constitute Mr. Sipsis' attempt to put on paper his version of what actually happened. However, the respondents' willingness to put the notes forward as having been made at the time casts suspicion upon the reliability of their substantive evidence relating to the events following Mr. Rapson's seizure.

These suspicions are further reinforced by two other pieces of evidence which indicate the respondents' willingness to be less than truthful when it serves their purposes. The first is Mr. Sipsis' testimony with respect to his visits to the various bars and restaurants named by Mr. Rapson in order to verify Mr. Rapson's applications for subsequent employment. As discussed above, Mr. Sipsis' evidence was clearly intended to suggest that the various establishments he visited kept employment

applications on file dating back to 1986 and that a search at each establishment revealed that Mr. Rapson's application was not among them. As became apparent in cross-examination, the bars and restaurants in issue no longer had employment applications from that time period on file and Mr. Sipsis himself knew that this would be the case given his own practice in this respect. This was a blatant attempt to mislead the Board and detracts significantly from the respondents' credibility.

The other piece of evidence which causes serious problems for the respondents' credibility is the questionnaire which was completed by the respondents during the initial investigation of the complaint (exhibit 7). In the questionnaire the respondents put forward a list of numerous defences to the complaint, several of which were shown during the course of this hearing to be completely unfounded. The respondents alleged, for example, that Mr. Rapson did not perform his job competently; that he was late for work; that he experienced breakage; and that he experienced several epileptic episodes. The questionnaire also makes no reference to Mr. Rapson quitting.

It is true that in the proceedings before the Board the respondents themselves did not adhere to the obviously false statements in the respondent's questionnaire, and indeed professed to have no knowledge of what had been written in the

questionnaire. Yet the discrepancy between the questionnaire and the respondents' testimony remains disturbing. It appears from the evidence that the respondents' lawyer, Mr. Statton, was responsible for completing the questionnaire. One of two conclusions must follow. Either the respondents gave Mr. Statton the information contained in the questionnaire and have since changed their story, or the questionnaire was completed without any concern for the veracity of the claims being made. In either case, the questionnaire suggests that the approach of the respondents to this complaint, through the intermediary of their lawyer, has been to argue anything that might seem plausible, even if unfounded, if it might be to their advantage. This strategy has the serious consequence of casting doubt upon the credibility of the respondents' evidence as a whole.

The cumulative effect of the numerous instances in which the respondents' evidence is either improbable, inconsistent or misleading is largely to destroy the respondents' credibility and, correspondingly, to enhance that of the complainant. I therefore conclude, subject to one exception which I will discuss below, that the more probable version of the factual events giving rise to the complaint is that put forward by the complainant. I therefore accept the following as the factual foundation of the complaint: that Mr. Rapson's employment with Stemms Restaurant was terminated on January 9, 1986 because of

Mr. Sipsis' belief that the complainant's epilepsy made him unsuitable for the job; that there had been no prior requests for a doctor's letter or letter of indemnity; and that the record of employment accurately reflects the reasons for the termination of the complainant's employment. Although the delay between the complainant's seizure and the termination of his employment remains something of a puzzle, it does not destroy the credibility of the complainant's story and might be explained by the intervening holiday period.

I remain more troubled by the complainant's explanation of the so-called letter of recommendation. Mr. Rapson's evidence is that he simply asked for a letter of recommendation after being told that he was fired and was subsequently presented with the letter in issue. Mr. Sipsis' evidence is that Mr. Rapson did not ask for a letter of recommendation, but rather a letter which specifically stated that his employment had been terminated because of his epilepsy and which he could use to collect unemployment insurance. Mr. Sipsis also testified that Mr. Rapson actually dictated the terms of the letter. And finally, Mr. Sipsis testified that the contents of the letter were untrue and that he engaged in this deliberate misrepresentation of events as a favour to the complainant.

Some of the respondents' assertions with respect to the

letter cannot be accepted. First, in light of my factual findings above, it has been determined that the contents of the letter are not a misrepresentation of what happened: Mr. Rapson's employment was terminated because of his epilepsy. Second, the letter itself belies Mr. Sipsis' assertion that its terms were dictated by Mr. Rapson. The phrasing and structure of the letter indicate that it was written by someone who did not have a perfect command of English, and thus that the likely author was Mr. Sipsis rather than Mr. Rapson.

On the other hand, the complainant's story does not ring entirely true. If Mr. Rapson had simply made a request for a letter of recommendation, it seems unlikely that Mr. Sipsis would have written the letter that he did, specifically referring to Mr. Rapson's epilepsy. I agree with Mr. Statton on this point: the letter was not a standard letter of recommendation. It is, of course, possible that Mr. Sipsis could have considered this to be an appropriate letter of recommendation and thus could have written such a letter on his own initiative. It seems more likely, however, that Mr. Rapson specifically requested a letter mentioning his dismissal because of his epilepsy. In perhaps the most convincing part of his testimony, Mr. Sipsis insisted that he would not on his own initiative have written the word "epilepsy" in the letter. His testimony also communicated a strong feeling of having been betrayed by Mr. Rapson after having

done him the favour of writing the letter he had requested: The evidence thus strongly suggests that the complainant did something more than simply request a letter of recommendation -- that in one way or another he requested a specific acknowledgment that he had been terminated because of his epilepsy, perhaps to provide documentation to support a subsequent human rights complaint.

To conclude, I cannot say with certainty that I disbelieve the complainant's evidence with respect to the letter of recommendation, merely that I find it unlikely and suspect that he has not provided the entire story. My dissatisfaction with the complainant's evidence on this single issue does not lead me to have serious doubts about the credibility of the remainder of his evidence with respect to the factual basis of the complaint, which remains, on the whole, more compelling than that of the respondents.

DISCRIMINATION

The factual basis of the complaint having been established, the next issue to be dealt with is whether the facts support a finding that the complainant's rights under the Code were infringed by the respondents. The right at issue is the right to equal treatment in employment found in s. 4(1) of the Code:

> 4.(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

Handicap is expressly defined in s. 9(1)(b) of the Code to include epilepsy. Section 8 of the Code prohibits the infringement of the right. As noted earlier, the complaint is brought against Gus Sipsis personally as the person who is alleged to have been directly responsible for infringing the complainant's rights by terminating his employment. The complaint is brought against the corporation, Stemms Restaurants Limited, on the basis of its vicarious liability for the acts of its officer and employee, Gus Sipsis, pursuant to s. 44(1) of the Code.

Given my findings of fact, it is not necessary for me to deal with the very difficult issue of whether, and in what circumstances, an employer's request that a disabled employee provide a doctor's letter as a condition of continued employment might be considered discrimination in employment contrary to the Code. Counsel provided detailed argument on this point, but I have felt it prudent not to respond to those arguments given the absence of a factual context in which to deal with the issue. The issue I am required to deal with is whether Mr. Sipsis'

termination of Mr. Rapson's employment on January 9, 1986,[5] based on his belief that the complainant's epilepsy made him unsuitable for the job, constitutes discrimination.

A starting point for analyzing the issue of discrimination on the basis of handicap is provided by the decision of Professor Cumming in Cameron v. Nel-Gor Castle Nursing Home and Nelson (1984), 5 C.H.R.R. D/2170 (Ont. Bd. of Inquiry) at paragraph 1839:

> A corollary is to require an employer to make a decision respecting employment of a handicapped person based upon a fair and accurate assessment of her true ability and not based upon a stereotype or misconception about her handicap. Having a handicap means not being able to do one or more important things that most people can do. The law cannot make a person's handicap disappear, of course, but it does insist that every person receive a fair chance to show what she is able to do, taking into account her ability. The law now protects every person from being pre-judged because of handicap by an employer. Equal opportunity for someone with a handicap means equal opportunity to do the things she can do effectively and safely. The law does not impose any undue hardship upon the employer or require that a person who presents a danger to the safety of the employee or others, or the employer's property be employed.

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[5] As established in the findings of fact above, Mr. Sipsis told Mr. Rapson his employment was being terminated on January 7 and Mr. Rapson actually worked until January 9. For purposes of convenience, I am going to refer to January 9 as the date of termination of employment.

Following Cameron v. Nel-Gor, the question to be asked in this case is whether the complainant was capable of performing the essential duties of his job as a bartender "effectively and safely" and whether his dismissal was thus based upon an arbitrary judgment about his suitability for the job based upon his handicap, in this case his epilepsy.

It should be noted that it is not necessary for the respondents to have acted with malice or ill-will toward the complainant in order for there to be a finding of discrimination. As emphasized by the Supreme Court of Canada in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. (1985), 7 C.H.R.R. D/3102, at para. 24766, the Code is concerned with the effect of the actions complained of on the victims of discrimination, in order to provide compensation, rather than with the intentions of the alleged discriminators for the purposes of imposing punishment:

> The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

The respondents' treatment of the complainant may thus constitute discrimination even if they honestly and genuinely believed that their actions were reasonable. On the facts of this case I do not believe the evidence would support a finding that Mr. Sipsis disliked or feared epileptics or that he acted malevolently toward Mr. Rapson because he was an epileptic. The only evidence to support such a finding is that of Annie McKay, another former employee of Stemms Restaurant, and I give that evidence little weight as it was not supported by any other evidence. Mr. Sipsis came to Mr. Rapson's aid during his seizure and ensured that Mr. Rapson was safely transported home. After terminating Mr. Rapson's employment, Mr. Sipsis was willing to write a letter which he believed would assist Mr. Rapson either in finding another job or in collecting unemployment insurance.

The evidence shows that Mr. Sipsis cared very much about the smooth and efficient operation of the restaurant. This suggests that he terminated Mr. Rapson's employment because of a belief that the complainant's epilepsy posed a safety risk given the nature of the job. Mr. Sipsis' main motivation appears to have been a fear of liability if Mr. Rapson suffered injury in a subsequent seizure. Consistent with the evidence, Mr. Sipsis might also have been motivated by general concerns with the disruption of business during a seizure and the possible negative reactions of customers to an epileptic seizure, although

admittedly there was no direct evidence of this and most of the evidence focused on issues of safety. In summary, Mr. Sipsis appears to have concluded that the risk of seizure posed by Mr. Rapson, as an epileptic, involved potential costs to the business that were too high.

Despite the absence of personal malice, if Mr. Sipsis was incorrect in his assessment of the complainant's ability to perform the job and the safety risks posed by his epilepsy -- if that assessment was an arbitrary pre-judgment of the complainant's suitability because of his handicap -- then Mr. Sipsis' actions in terminating Mr. Rapson's employment will constitute discrimination.

Before I turn to the central question of whether Mr. Rapson was capable of performing his job and hence whether the termination of his employment constituted discrimination on the grounds of handicap, two preliminary matters must be addressed.

The first concerns Mr. Rapson's status as a probationary employee. The respondents suggested in argument that because Mr. Rapson had not completed his three month probationary period and could, pursuant to employment standards legislation, be dismissed by his employer at any time, he could not be protected from dismissal by the Human Rights Code. That position is simply

incorrect, as indicated by the case of Horton v. Regional Municipality of Niagara and Odell and Orvidas (1987), 9 C.H.R.R. D/4611 (Ont. Bd. of Inquiry) in which a probationary employee whose probationary employment was terminated and was not converted to permanent status brought a successful complaint under the Code. The Code protects all employees, whether probationary or permanent, from discriminatory treatment with respect to employment. Mr. Rapson is thus entitled to bring a claim of discrimination with respect to the termination of his employment during his probationary period. The complainant's probationary status was also raised with respect to the calculation of damages, an issue which will be addressed below.

A second preliminary issue concerns the complainant's failure to disclose his epilepsy to the respondents at the time of his hiring. The respondents devoted a great deal of time during the hearing to establishing that it would have been preferable if the complainant had disclosed his epilepsy from the beginning. It was clear from Mr. Sipsis' testimony (transcript, Vol. 5, p. 30) that he felt that Mr. Rapson had lied on his application form by not disclosing that he was an epileptic.

Implicit in the respondents' treatment of the complainant's non-disclosure was an attempt to portray the complainant as irresponsible, deceitful and disrespectful of his employers, a

theme which ran through the respondents' entire case. The explicit argument made by the respondents was that disclosure would have been preferable in that it would have allowed the respondents to be prepared for a seizure and to have offered more appropriate assistance, thereby minimizing the risk of injury to the complainant himself as well as to co-workers. The respondents' arguments in this respect were supported, at least in part, by the testimony of Dr. Dina Savelli, Mr. Rapson's neurologist, who stated her belief that ideally patients should advise their employers of the fact that they have epilepsy.

It is difficult to disagree with Dr. Savelli on the issue of disclosure. The ideal situation would be for an employee to disclose his or her epilepsy to an employer at the time of hiring to ensure that the employee would be provided with support and security in the case of a seizure in the workplace. However, as counsel for the Commission argued, we do not live in an ideal world. The reality is that disclosure of a disability at the time of hiring might well result in an employer refusing to hire an applicant because of his or her handicap, without fairly considering the applicant's ability to perform the essential duties of the job. In the case of an epileptic applicant, for example, prior disclosure might result in an employer not hiring the applicant simply because of discomfort with the idea of having an employee who might experience a seizure in the

workplace. No doubt because of a desire to preclude such discriminatory responses, the legislature has in fact enacted s. 22(2) of the Human Rights Code which prohibits an employer from making enquiries, either orally or in writing, during the employment application process, that would permit the employee to be classified on the basis of a prohibited ground of discrimination, including handicap. The corollary of this would appear to be that an employee has no obligation to provide this information.

The full implications of s. 22(2) of the Code on disclosure of a disability at the time of hiring in situations where the disability may be directly relevant to capacity to perform the job safely and effectively need not be explored in this case. As will be discussed in more detail below, in my conclusions on the issue of whether the termination of the complainant's employment constituted discrimination, his epilepsy did not pose a threat to the safety of himself or others and did not interfere with his ability to perform the essential duties of his job as a bartender. Put simply, his epilepsy was irrelevant in this employment context and he was under no obligation to disclose his epilepsy at the time of his hiring.

The evidence reveals that the complainant in fact disclosed his epilepsy in previous work contexts where, because of the

nature of the work, safety concerns were at issue. In the case of his employment at Stemms Restaurant, however, he chose not to disclose his epilepsy. He felt that it was not relevant to his ability to perform the job and also that disclosure might simply jeopardize his chances of getting the job in the first place. The practical result of his failure to disclose was that his employers and co-workers were unprepared for his seizure and may not have offered completely appropriate assistance. However, the failure to disclose is of no legal significance; it is irrelevant with respect to the issue of whether the respondents discriminated against the complainant in terminating his employment.

The main evidence bearing on the issue of whether the respondents were justified in terminating the complainant's employment because of his epilepsy was that of Dr. Dina Savelli, the complainant's neurologist. Dr. Savelli prepared a medical report, dated May 29, 1990 (exhibit 11, tab 2) and also provided a copy of a reporting letter, dated December 18, 1985, which she had written to Dr. Huggins, the complainant's family physician (exhibit 11, tab 3). Dr. Savelli was called as a witness by the Commission and gave vive voce evidence based upon the medical report and the reporting letter.

In her testimony Dr. Savelli began by providing some general

information about epilepsy. Epilepsy, she indicated, simply refers to "a tendency toward seizures" (transcript, Vol. 3, p. 142). She went on to provide an over-view of the many different forms which epilepsy might take, but noted that very often for a given individual the episodes have a consistent pattern.

With respect to Mr. Rapson and his form of epilepsy, Dr. Savelli testified that she saw Mr. Rapson for the first time in January of 1984. Dr. Savelli's practice was based in Hamilton and Mr. Rapson was at that point attending McMaster University in Hamilton. He had previously been followed by a neurologist in Toronto. In describing Mr. Rapson's medical history, Dr. Savelli noted that he came to her with a history of seizures beginning when he was approximately 13 year old. She testified that his seizures fell into a consistent pattern. They were preceded by a warning in the form of an aura -- a sense of disorientation and vertigo. After his warning there would follow a loss of consciousness and what is called a grand mal event. The seizure was followed by a postictal state of headache, fatigue and confusion, which in Mr. Rapson's case was not of extensive duration.

At the point in time when he first visited Dr. Savelli, Mr. Rapson was on an anti-convulsant medication called dilantin which was controlling his seizures effectively. He reported that in

the last four years he had had only two seizures. The last seizure had occurred in March of 1983 when he had been studying for two nights in a row and under considerable stress. Because of concerns with the side effects of dilantin, Dr. Savelli switched Mr. Rapson to another anti-convulsant medication called tegretol. A follow-up visit to Dr. Savelli a few months later in March of 1984 revealed that Mr. Rapson was tolerating the medication well and that it appeared to be effective in managing his epilepsy. Mr. Rapson did exhibit at that time a mild leukopenia, which is a reduction in white blood cells. According to Dr. Savelli this is one of the recognized side effects of the medication and is not dangerous unless the white cells drop to a serious level, which was not the case with Mr. Rapson.

Dr. Savelli did not see Mr. Rapson again until December 9, 1985. Between these two visits, as has been described earlier in these reasons, Mr. Rapson had travelled in Europe, where he experienced a seizure in May of 1985, and on his return had commenced employment with Stemms Restaurant, where he experienced the seizure of November 29, 1985. It was this seizure which prompted his visit to Dr. Savelli the next week.

Based upon her examination of Mr. Rapson, Dr. Savelli had two explanations for the seizure of November 29. The most likely explanation was that Mr. Rapson had been suffering from a cold

and that the viral infection had lowered his resistance and thus lowered the seizure threshold. As well, blood tests taken on December 12, 1985 showed a low tegretol level. (His reading was 26 and the therapeutic range was between 34 and 50). Dr. Savelli explained that a low tegretol level means that there is not an adequate amount of the medication in the blood stream to provide full anti-convulsant coverage. Having confirmed with Mr. Rapson that he was taking his medication as prescribed, Dr. Savelli speculated that the low levels may have been caused by increased efficiency in the metabolism of the drug by the liver. This in turn could have been caused either by the length of time Mr. Rapson had been on the drug or the effect of some Tylenol which he had taken for his cold.

Dr. Savelli's immediate response to the low tegretol blood levels was not to order an immediate increase in the dosage of the medication because she was concerned that an increased dosage would aggravate Mr. Rapson's lowered white cell count. Instead, she decided to monitor the tegretol levels and had them rechecked on January 29, 1986. Those tests showed somewhat improved tegretol levels (a reading of 32). Although the levels were still outside the therapeutic range, they were close enough that Dr. Savelli recommended no increase in tegretol dosage.

Dr. Savelli did not see Mr. Rapson again until September 24,

1986 when he came for a follow-up visit. Mr. Rapson reported at that time that he had experienced no subsequent seizures. Blood tests taken at that time indicated tegretol levels of 33.

Dr. Savelli testified that in her view Mr. Rapson was conscientious and responsible with respect to his epilepsy (transcript, Vol. 3, p. 168 and pp. 183-184). In her letter to Dr. Huggins she referred to Mr. Rapson's "intelligent and motivated self-care" and referred specifically to his decision not to drive after experiencing the seizure in Europe. When questioned about Mr. Rapson's suitability for the job of bartender at Stemms Restaurant, Dr. Savelli stated that in her opinion Mr. Rapson was quite suitable for the job (transcript, Vol. 3, p. 206). When specifically questioned by Mr. Statton about Mr. Rapson's suitability for work in December of 1985 when his tegretol levels were low and when he was possibly at higher risk of a seizure, Dr. Savelli's answer remained the same -- that Mr. Rapson was suitable for work. At most, Dr. Savelli would have advised Mr. Rapson, like any person with a bad cold, to "maybe take a few days off work" (transcript, Vol. 3, p. 196).

In his testimony the complainant briefly recounted his medical history since his last visit to Dr. Savelli. He testified that his next seizure, subsequent to the seizure at Stemms, was in September of 1986 and that he had had no seizures

since then.

The medical evidence shows that Mr. Rapson is an epileptic whose seizures are effectively controlled by anti-convulsant medication. His medication does not offer absolute protection against seizures, but over an extended period of time he has experienced at most two seizures a year, and has gone for several years without experiencing a seizure at all. He was possibly at somewhat higher risk of having a seizure in November and December of 1985 because of the low tegretol levels in his blood, likely caused by a viral infection combined with the use of tylenol. However, although the medication levels were low at that point in time, some protection from seizures was still being provided and in fact Mr. Rapson only experienced one seizure.

The evidence also shows that the complainant was conscientious and responsible in caring for his epilepsy. He took his medication as prescribed, followed up on his seizure of November 29, 1985 with a visit to Dr. Savelli, and made a decision not to drive because of his epilepsy. The respondents' attempt to portray the complainant as irresponsible and cavalier in his attitude toward his epilepsy finds no support in the evidence. The respondents referred to three specific examples of such allegedly irresponsible behaviour: the fact that the complainant occasionally drank alcohol; that he failed to see Dr.

Savelli immediately after his return from Europe where he had experienced a seizure; and his failure to have a third blood test in the spring of 1986. None of these examples are evidence of irresponsible behaviour. Mr. Rapson was not told that he could not drink alcohol; he was advised to use it with moderation. With respect to the second and third examples of alleged failure to seek medical attention, as Mr. Rapson indicated in cross-examination, in both instances he was feeling fine and having no problems, hence he felt there was no need to see a doctor or have tests done. As an epileptic, Mr. Rapson did not require constant medical attention.

The issue to be decided is whether Mr. Rapson's medical condition, as it has just been described, rendered him unsuitable for employment as a bartender. The respondents did not address this issue directly, given that their case was based upon the contention that Mr. Sipsis had asked Mr. Rapson for a medical letter confirming his suitability for employment and that Mr. Rapson had refused such a letter. In making the argument that their request for a letter was a reasonable one in the circumstances, the respondents did, however, rely upon the medical evidence. They argued that if Mr. Rapson had requested a doctor's letter, the letter would have indicated that he was unsuitable for employment while his tegretol levels were low. The respondents thus addressed the issue of Mr. Rapson's

suitability for employment indirectly, through the issue of the reasonableness of the request for a medical letter.

The respondents in effect contended that even if Mr. Rapson were generally suitable for work as a bartender, he was not suitable for such employment in December of 1985 and January of 1986 when his low tegretol levels meant that he posed a risk to the safety of himself and others in the workplace. The respondents argued that because of this risk, the complainant should not have been allowed to work until his tegretol levels returned to normal. They contended that their position was supported by the evidence of Dr. Savelli who stated that the complainant was "at risk" during this period.

The respondents' argument constitutes a clear misreading of the medical evidence. On re-examination by counsel for the Commission, Dr. Savelli clarified that in speaking of Mr. Rapson as being at risk, all that she meant was that he was at risk of having a seizure (transcript, Vol. 3, p. 205). The fact that Mr. Rapson was at risk of having a seizure, given sub-therapeutic blood levels of his anti-convulsant medication, does not mean that he posed a risk in the workplace. As has been noted above, in her testimony Dr. Savelli clearly stated that, in her opinion, Mr. Rapson was suitable for employment even in the period when his tegretol levels were low. She pointed out that even though

the tegretol levels were sub-therapeutic, there was still some protection (transcript, Vol. 3, p. 205). She also emphasized that a seizure itself is a very short event from which there is fairly quick recovery (transcript, Vol. 3, p. 183). Dr. Savelli's comment that Mr. Rapson should have taken a few days off work to get over his cold cannot be interpreted as an opinion that Mr. Rapson was unsuitable for work and should have stayed home during the entire period when his tegretol levels were low.

A review of the evidence, including both the evidence of Dr. Savelli and also the evidence of what occurred when Mr. Rapson experienced his seizure at Stemms, leads to a clear conclusion. The complainant's epilepsy in no way made him unsuitable for employment as a bartender and the termination of his employment because of his epilepsy constitutes discrimination. Two factors are important in reading this conclusion: the nature of the complainant's epilepsy and the nature of his employment.

Mr. Rapson was admittedly at risk of having a seizure during the period of time he was employed with Stemms, and perhaps at a somewhat enhanced risk because of his cold and low tegretol levels. However, the risk of his having a seizure was relatively low given his prior medical history and the fact that his doctor was satisfied that his dosage of tegretol was the proper dosage and one which provided effective control of his seizures. Even

during his period of what might be called enhanced risk, he only experienced one seizure. In many ways, this complaint raises a relatively easy set of facts on which to determine whether or not a person with epilepsy has experienced discriminatory treatment. The complainant is not someone who is subject to frequent seizures.[6] He is someone whose epilepsy was and is effectively under control and who suffers from occasional seizures at points of stress or lowered resistance.

The respondents' contention was essentially that whenever an epileptic presents a risk of a seizure because of sub-therapeutic blood levels of anti-convulsant medication, the epileptic should not be allowed to work and consequently that any dismissal in such circumstances is justifiable. This is a position which would completely undercut the purpose of the Code, which is to ensure disabled employees fair access to employment opportunities. Risk of seizure cannot be predicted as easily or as precisely as the respondents suggest. As Dr. Savelli stated at the beginning of her testimony, epilepsy is by its very definition a tendency toward seizures. Every epileptic presents

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[6] I do not mean, by those comments, to suggest that frequency of seizures might in and of itself render someone unsuitable for employment, absent considerations about the specific nature of the employment in issue. That is an issue to be determined in a particular factual context as it arises. All that I am saying here is that the infrequency of seizures makes this case an easy one.

some risk of a seizure. Tegretol levels fluctuate constantly and are not easily monitored on a daily basis. Furthermore, tegretol levels may or may not be accurate predictors of whether a seizure will occur. Even with low tegretol levels it is possible that a seizure will not occur. In Mr. Rapson's case, for example, even with low tegretol levels in the period after his seizure at Stemms, he experienced no subsequent seizures. Given the difficulty, if not impossibility, of tying risk of seizure to tegretol levels, the respondents' position essentially becomes that if an epileptic presents a risk of seizure that person is not suitable for employment. That position, which would essentially preclude the employment of all epileptics, contrary to the purposes of the Code, is completely unacceptable.

Being at risk of a seizure might in some employment contexts render an epileptic unsuitable for employment because of the risks posed to the safety of the epileptic or others in the work environment. But in many work contexts this will not be the case. A seizure is typically a temporary, isolated event. Typically the epileptic poses no risk to others and requires little in the way of assistance except to be allowed to lie down comfortably and experience the seizure.

The respondents argued that Mr. Rapson's employment as a bartender fell into that category of employment where an

employee's being at risk of a seizure would create an unacceptable risk both to the safety of the employee and others. There concerns were based upon the presence of a great deal of equipment and glassware behind the bar. At least in the case of Mr. Rapson, however, these concerns were overblown. Because of the pattern of his seizures, Mr. Rapson experienced an aura which warned him of the possibility of a seizure and allowed him time to move himself to a safe place. In the one seizure he experienced at Stemms, no glasses were broken, no co-workers or customers were injured, and Mr. Rapson himself experienced only a few bumps and bruises. The evidence suggests that the risk of injury or property damage were Mr. Rapson to experience a subsequent seizure were minimal and in no way justified the termination of his employment.

To summarize, Mr. Rapson was both at a relatively low risk of having a seizure, given his medical history, and furthermore, even if he were to have a seizure, the risk of injury was minimal. He was capable of performing the duties of his job safely and effectively and without undue risk to himself or others. To use the language of Cameron v. Nel-Gor, Mr. Rapson was pre-judged by Mr. Sipsis on the basis of stereotypical assumptions about his handicap rather than on the basis of his true capacities and abilities. The complainant was fully capable of performing the duties of his job and was terminated solely

because of his handicap. This constitutes straightforward discrimination, and does not raise the more complex issue of the extent of the duty to provide special accommodation for a disabled employee which may be imposed on an employer. The only additional cost the respondents were likely to bear as a result of having Mr. Rapson, an epileptic, as an employee was the minor disruption in the operation of the business which would occur during a seizure, if Mr. Rapson were to experience one. It is possible that Mr. Sipsis may also have been worried about negative customer reactions. To give weight to these reactions would be to reinforce overtly discriminatory attitudes and provides even less justification for Mr. Rapson's dismissal than concerns about safety.

DAMAGES

I have concluded that the complainant's rights to equal treatment in employment under the Code were infringed by the respondents when they terminated his employment because of his epilepsy. The last issue to be addressed is the appropriate remedy. The provision of the Code which deals with a Board of Inquiry's general remedial powers is s. 40(1):

> 40. - (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,

> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

In this case the Commission requested, pursuant to s. 40(1) of the Code, an award of special damages to cover the loss of income suffered by the complainant until he found subsequent employment and in addition an award of general damages in the amount of $3,000. Each of these claims will be dealt with in turn. Let me state at the beginning, however, that it is on the issue of damages that I find the Commission's case the weakest and the complainant's evidence the most unsatisfactory.

a) Special Damages: Loss of Earnings

It is clearly established that a complainant whose employment has been terminated in violation of the Code may claim

compensation under s. 40(b) of the Code for the loss of earnings flowing from the dismissal. Originally there was some dispute as to the appropriate principles for calculating this loss. Some argued that the standard from wrongful dismissal cases, based upon the period of reasonable notice, was the appropriate one. Others argued in support of the tort standard where compensation is provided for losses that were reasonably foreseeable. The debate has been decided in favour of the tort standard by the Ontario Court of Appeal in Re Piazza et al. and Airport Taxi (Malton) et al. (1989), 69 O.R. (2d) 281. Referring to the predecessor to the current s. 40 of the Code, the Court stated at 284:

> As will be seen, this section simply empowers the board to order compensation. The purpose of the compensation is to restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred. I find nothing in the language of the foregoing section which would import into it the limit on compensation which is imposed by the common law with respect to claims for wrongful dismissal.

Thus, the principle upon which lost wages are to be calculated in cases of employment discrimination is that of restoring the complainant to the position he or she would have been in had the discrimination not occurred. The other well-established principle that qualifies this is that the complainant is subject to a duty to take all reasonable steps to mitigate his

or her loss. The respondents are responsible for all losses that were a reasonably foreseeable result of the discrimination; they are not responsible for losses which were avoidable. The duty to mitigate is described by the Supreme Court of Canada in the leading case of Red Deer College v. Michaels and Finn, [1975] 5 W.W.R. 575 at 579:

> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.

Mr. Rapson testified that, commencing the week after he was dismissed from Stemms, he began visiting various bars and restaurants looking for work similar to his employment at Stemms. He stated that he spent on average a couple of hours a day looking for work. He acknowledged that in the first week or so after leaving Stemms he also devoted time to looking for an apartment, having committed himself to moving into his own apartment by February 1. In terms of the specifics of his job search, Mr. Rapson testified that while he did read the Toronto Star and follow up on some of the advertisements for employment opportunities, most of the places he visited had not advertised for help but were simply, to his mind, good places to work which were accessible by public transit. This latter requirement was necessary as Mr. Rapson does not drive because of his epilepsy.

In the course of preparing to bring his complaint, Mr. Rapson drew up a list of eight bars and restaurants where he specifically remembered filling out application forms (exhibit 12). These were the names disclosed to the respondents at the beginning of this hearing, together with the name of a ninth bar which the complainant had subsequently recalled (exhibit 17). Finally Mr. Rapson testified that he visited Manpower at least once, and possibly more times.

Mr. Rapson was not successful in his attempt to find employment as a bartender. Seven weeks after leaving Stemms, at the end of February 1986, Mr. Rapson decided to shift directions in his job search. He responded to an advertisement for a sales position with a marketing company, W.A. Marketing, and was hired at a salary of $150 per week plus commission. Mr. Rapson worked there for only a couple of weeks and then left because of concerns about the stability of the business and an unexpected conversion of his salary to straight commission. On April 1, 1986, a couple of weeks after his departure from W.A. Marketing, Mr. Rapson found another job with Kettle Creek Canvas Company as a co-manager of one of the company's retail clothing stores. He worked there until July of 1987. His wages at Kettle Creek were $330 per week.

Mr. Rapson testified that he did not receive any form of

income replacement while he was looking for work after the termination of his employment with Stemms. More specifically, he testified that he did not apply for unemployment insurance as he did not satisfy the eligibility requirements.

With respect to damages for loss of income, counsel for the Commission argued that the complainant should be entitled to compensation for the entire eleven week period between the termination of his employment with Stemms and the commencement of his employment with Kettle Creek, deducting the amounts earned in his two weeks with W.A. Marketing. Alternatively, she argued that damages should be awarded at least for the seven week period of unemployment prior to the complainant's commencement of employment with W.A. Marketing.

The respondents raised several arguments against the award of damages for loss of earnings requested by the Commission. Some are easily dismissed. The respondents' contention that as a probationary employee who was entitled to no notice prior to termination the complainant suffered no compensable loss is simply incorrect in light of the Ontario Court of Appeal decision in Re Piazza. Also, the fact that the complainant viewed his employment at Stemms as a "stop gap" until he found what Mr. Statton referred to as a "career position" does not mean that the complainant was not entitled to compensation for the loss of that

employment. It was a job which provided him with needed money to meet his basic living expenses and he is certainly entitled to compensation for its loss.

More serious arguments were raised with respect to the issue of mitigation and the portion of the complainant's lost income for which the respondents should be responsible. The respondents argued that the complainant's evidence did not establish that he made reasonable efforts to mitigate his loss. The most extreme version of their argument was that the complainant had made no efforts at all to mitigate and indeed that the list of restaurants and bars to which he said he had applied (exhibits 12 and 17) was fabricated.

To support their argument about mitigation the respondents relied upon evidence respecting the general state of the economy during the period in issue. According to the respondents the economy was buoyant in 1985-1986. Both Mr. Sipsis and Mr. Kanellopoulous testified that there was virtually zero unemployment in the restaurant business; that restaurants which needed help often could not hire anyone; and that someone looking for work in a restaurant at that time would have had no difficulty finding a job. Additional evidence was submitted in the form of a photocopy of the help wanted ads from the Toronto Sun of Friday, January 10, 1986 (exhibit 15) containing

advertisements for employment in the hotel and restaurant sector. Contained on that page are numerous advertisements for waiters and waitresses and some for bartenders. In cross-examination Mr. Rapson admitted that he did not apply to any of those bars and restaurants.

Before dealing with the central issue of whether the complainant's efforts at mitigation were reasonable, I would like to deal quickly with the allegation of fabrication of evidence. I have no reason to believe that the complainant did not apply for employment at the bars and restaurants listed in exhibit 12 as he stated. There is nothing to support the allegation of fabrication of evidence. Indeed, in this context, the charge of fabrication is more appropriately levelled at the respondents in respect of Mr. Sipsis' testimony concerning his visits to the bars and restaurants named by the complainant.

In determining whether the complainant's efforts to mitigate were reasonable, reference must be made once again to the leading decision of the Supreme Court of Canada in Red Deer College. The case affirms, at pp. 579-60, the well-established rule that the onus of proving that the plaintiff could have reasonably avoided some part of the loss is on the defendant, or in this case the respondents:

> If it is the defendant's position that the

> plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable consequences.

The Supreme Court also quoted with approval, at p. 580, the following passage from Cheshire and Fifoot's Law of Contract (1972), 8th e.d. at p. 599 suggesting that the onus on the defendant should be a heavy one because an innocent party is being required to take positive action:

> "But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame."

A recent decision of the Canadian Human Rights Commission Review Tribunal in Canadian Armed Forces v. Canadian Human Rights Commission and Morgan (September 14, 1990, unreported) contains an elaboration of the idea that the defendant (or respondent) as wrong-doer has a difficult burden to meet. The Review Tribunal held that in assessing the reasonableness of the efforts at mitigation, reasonableness is to be judged from the perceptive of the employee and in the context of his or her personal circumstances. The duty to mitigate is not equivalent to a duty on the employee to take steps to reduce the quantum of the former

employer's liability. The Tribunal quoted with approval, at p. 42, from an unreported decision of the British Columbia Court of Appeal (CA009795, Vancouver Registry) at p. 6 of the reasons of Taylor J.A. speaking for the court:

> "The duty to "act reasonably" in seeking and accepting alternate employment cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty as to take such steps as a reasonable person in the dismissed employee's position would take in his own interest - to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower-paying alternate employment with doubtful prospects, and then sue for the difference in what he makes in that work and what he would have made had he received the notice to which he was entitled".

In light of the principles articulated in Red Deer College and Canadian Armed Forces v. Morgan counsel for the Commission contended that the complainant took reasonable steps to mitigate his loss and that the respondents have not satisfied the onus placed upon them of establishing that his efforts were not reasonable.

Some of the respondents' arguments with respect to the unreasonableness of the complainant's efforts at mitigation are clearly untenable in light of the principles established by the

case law discussed above. Contrary to what the respondents argued, the complainant was not obliged to take any minimum wage job available. He was entitled to look for employment comparable to the employment he had lost. His job as a bartender at Stemms had some features that distinguished it from other minimum wage employment: a salary which, although minimum wage, could be supplemented by tips; hours of work which allowed him free time during the day to engage in a search for other, more long-term employment opportunities; and an easily accessible location. The complainant was entitled to seek these features in any replacement for his employment at Stemms. As well, the complainant is not to be faulted for devoting some of his time immediately after leaving Stemms to finding an apartment rather than devoting his time exclusively to a search for employment. He should not have been expected, because of the respondents' wrong-doing, to disrupt his planned move.

On the other hand, I am persuaded by many of the respondents' arguments with respect to the lack of evidence of reasonable efforts at mitigation. It is true that the respondents' evidence with respect to the state of the economy at the relevant time and the availability of employment opportunities, although of some effect and not contradicted by any evidence led by the Commission, is not terribly strong. This evidence would not, by itself, satisfy the onus placed upon the

respondents to disprove the reasonableness of the complainant's mitigation. However, as Red Deer College makes clear, in the absence of evidence led by the defendants, the issue of reasonableness of mitigation is to be determined by the trial judge based on an assessment of the plaintiff's evidence. I refer once again to the passage from Red Deer College dealing with the issue of onus, cited earlier in this decision:

> If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable consequences. (emphasis added)

I take from this passage that there remains a basic obligation on the complainant to provide sufficient evidence to convince the trier of fact, in this case the Board of Inquiry, that reasonable efforts have been made to mitigate his or her loss.

In this case, after reviewing the complainant's evidence with respect to mitigation, I have concluded that it simply does not reveal sufficient efforts to satisfy the duty to mitigate to justify an award for lost income over the eleven week period before he found employment with Kettle Creek, or even the seven week period before he found employment with W.A. Marketing. The complainant's evidence with respect to mitigation was noticeably

vague. He was able to provide few details of his job search, except for his visits to the few bars and restaurants listed in exhibit 12. When asked how many hours a day he devoted to his job search, he vaguely suggested that he might have spent a couple of hours a day. He did not know whether he visited Manpower once or several times. Admittedly, the events at issue were some time ago and at this remove one cannot expect perfect recall. On the other hand, the complainant's almost complete lack of any memory on the specifics of his job search suggests that many of the details were never there to be recalled.

Other parts of the complainant's testimony also raise questions about the seriousness of his attempt to find new employment. He testified that he only spent a couple of hours a day looking for a job. This does not suggest a serious job search, especially when it is noted that he found an apartment about a week after leaving Stemms, thus freeing up his time. It appears that the complainant did not seriously search for or pursue advertised employment opportunities. In cross-examination, he could not specifically remember submitting even one application in response to an ad. His evidence reveals instead, that he simply chose to apply to a few well-known establishments, even though they were not specifically advertising for help. The bars he selected also indicate the unrealistic nature of his job search. Mr. Rapson was not well-

qualified as a bartender and Stemms was neither a large nor a fashionable bar. Yet Mr. Rapson appears to have applied only to some of the most fashionable and popular bars in the city in his search for employment.

I would like to note the differences between the facts of this case and other cases dealing with mitigation submitted to me by counsel for the Commission. In Canadian Armed Forces v. Morgan, where the complainant was compensated for lost income over a period of several years, a neighbour and friend of the complainant testified and described in detail the daily routine of the complaint in pursuing all available means in his search for employment. As well, the Tribunal noted in that case that the economy was in a state of recession during the entire period the complainant was looking for employment. Finally, in Morgan the complainant was looking for a "career employment" similar in structure, security and lifestyle to that offered by the armed forces, a search which might reasonably be expected to take a fairly extensive period of time, particularly in poor economic conditions.

In Engel v. Mount Sinai Hospital and Lanigan-Gilmour (1989), 11 C.H.R.R. D/68 (Ont. Bd. of Inquiry), where three months damages for lost wages were awarded, the complainant was an occupational therapist, looking for what might again be termed

"career employment". As well, given the complainant's precarious health and an advancing pregnancy, the Board concluded that a vigorous and energetic job search was not practical at the time. In Cameron v. Nel-Gor the complainant was awarded lost wages for a fourteen week period. That case involved a young woman who suffered from a deformity of her left hand and who was seeking her first job out of high school. The evidence revealed that the complainant suffered severe depression and withdrawal after being refused employment as a nurse's aide because of her handicap.

In Mr. Rapson's case, he was not seeking "career employment". He was seeking a replacement for a job which, to paraphrase his own words, allowed him to pay the rent. Although he was not expected to take any minimum wage job and was entitled to search for a job with remuneration and work conditions equivalent to those at Stemms, the fact remains that he was looking for relatively unskilled, short-term employment and was thus not as restricted in his job search as someone seeking permanent and secure employment in a chosen profession or career. In contrast to Canadian Armed Forces v. Morgan, the period during which the respondent was seeking employment was one of economic buoyancy, a fact which was not challenged by counsel for the Commission.

Although Mr. Rapson referred generally to feelings of

depression and a lack of self-confidence after leaving Stemms, the evidence lacked specificity. Furthermore, counsel for the Commission did not make an argument that Mr. Rapson was unable to engage in a serious job search because of his feelings of depression. Instead, her argument was that he did engage in a serious job search. I would note finally the absence of any corroborating evidence with respect to mitigation. Neither Mr. Rapson's room-mates at the time nor his then girlfriend (now his wife) were called to testify as to Mr. Rapson's daily routine in pursuing his job search or as to any aspects of his emotional condition following the termination of his employment at Stemms which may have affected his job search.

Recognizing that the complainant was entitled to be somewhat selective in his search for a job equivalent to that at Stemms, that he was entitled to devote time to searching for an apartment, and that any victim of discrimination suffers feelings of distress and anger which would likely impede an immediate job search, I have concluded that four weeks would have been a reasonable period of time for Mr. Rapson to find alternative employment.

The complainant is therefore entitled to an award of special damages in respect of loss of earnings for four weeks. Mr. Rapson's record of employment from Stemms (exhibit 9, tab 5)

indicates that his total earnings at Stemms over eleven weeks were $1,550. His last week of employment was not a full week. If his earnings for that week are deducted from his total earnings, the remainder, $1,452.50 represents his earnings over ten weeks. His average weekly earnings may thus be calculated as $145.25. Mr. Rapson testified that his tips averaged between $120 and $150 per week (transcript, Vol. 1, p.44). This was not disputed by the respondents. I will accept an average figure of $135 per week in tips. If the weekly salary and tips are added together, the result is average weekly earnings of $280.25. An award of damages covering the loss of these earnings for four weeks would result in a total award of $1,121.

Boards of Inquiry commonly award interest on awards of special damages in respect of loss of earnings. The respondents argued that interest should not be ordered because of the delay in bringing this matter before a Board of Inquiry. That argument must be rejected. I have no evidence on which to base a conclusion that the Commission was responsible for the delay; it is just as possible that responsibility for the delay lies with the respondents themselves rather than with the Commission. I simply do not know. A more important factor in the decision to award interest, however, is that the respondents have had use of the sum of money represented by the damage award during the period of time for which interest is being requested. I

therefore award interest on the amount of special damages for the period of time commencing February 16, 1987, when the respondents received notice of the complaint, to April 29, 1991, the date of this decision. In calculating the interest I have used the average annual interest rates established by the Registrar of the Supreme Court. The calculations are as follows generating an interest award of $572.95:

Period of Time	Average Annual Interest Rate	Amount of Interest
Feb. 16, 1987 - Feb. 15, 1988	10.00%	$112.10
Feb. 16, 1988 - Feb. 15, 1989	10.75%	$120.50
Feb. 16, 1989 - Feb. 15, 1990	13.50%	$151.33
Feb. 16, 1990 - Feb. 15, 1991	14.50%	$162.54
Feb. 16, 1991 - Apr. 26, 1991	*12.50%	$ 27.64
	Total	$574.11

*This figure is an average of the rates for the first two quarters of 1991, 14.00% and 11.00% respectively.

When the award of interest ($572.95) is added to the award of special damages ($1,121) the result is an amount of $1,695.11.

b) General Damages

Counsel for the Commission has requested general damages in the amount of $3,000 to compensate Mr. Rapson for the infringement of his rights under the Code and the injury to his self-respect and dignity flowing from the respondents' discriminatory conduct. In support of this claim Mr. Rapson gave brief testimony to the effect that he suffered a sense of depression and loss of motivation after leaving Stemms (transcript, Vol. 3, p. 45). In giving his testimony on this point, the complainant referred to notes that he had made shortly after his departure from Stemms in which he had attempted to put on paper information relevant to the human rights complaint which he was planning to file. No other evidence was led to support the claim for general damages. There was, for example, no medical evidence and no testimony of friends or family with respect to the emotional or psychological effects of the discrimination on the complainant.

The respondents argued that there should be no award of general damages in this case. Their position was that general damages should not be awarded as a matter of course in every human rights case where discrimination has been established. Drawing on the principles of employment law as revealed in wrongful dismissal cases, they argued that compensation should

not be available for mental anguish unless there is actual proof of suffering and, in addition, malice on the part of the employer. Dubious as to the applicability of the employment law cases relied upon by the respondents in the human rights context, I asked Mr. Statton whether he had any human rights cases which would support his argument that general damages are not to be awarded as a matter of course. Mr. Statton responded that there were such cases but he did not have them with him. In the face of valid protestations by counsel for the Commission who felt that Mr. Statton should suffer the consequences of his lack of preparation, I nonetheless allowed Mr. Statton an opportunity to file, within the next few days, supplementary human rights case law supporting his argument on awards of general damages. My motivation in allowing Mr. Statton this indulgence was to create as fair a hearing as possible for the respondents given their allegations of unfair treatment at the hands of the Commission.

Mr. Statton failed to provide any supplementary case law within the period of time allowed him and I refused his request for a further extension of time. The highly unusual circumstances of that request bear recounting as a further illustration of the egregious behaviour of the respondents in this proceeding.

In requesting an extension Mr. Statton stated that he had

been thwarted in his attempt to gather the information I had requested by counsel for the Commission, Ms. Rosen. It appears that on the morning of the very day on which his submissions were due Mr. Statton called the offices of the Human Rights Commission requesting statistical information on awards of general damages. He was told that decisions of Boards of Inquiry were not recorded in the Commission's data base, which only contained information on settlements. With respect to decisions of Boards of Inquiry, he was referred to the Director of the Legal Services, who after consulting with Ms. Rosen, informed Mr. Statton that as he was involved in proceedings to which the Commission was a party it would be best if he conducted his own legal research of Board of Inquiry jurisprudence.

I saw nothing in these circumstances which warranted a further extension of time for filing of supplementary material. The merits or legitimacy of the Commission's policy of refusing members of the public access to information is not one which concerns me. If Mr. Statton wishes to challenge that policy there are other avenues open to him. In terms of these proceedings, the series of events described above indicate that Mr. Statton did not make any serious attempt to comply with my request for additional information. I had specifically requested the production of additional human rights case law in which no awards of general damages were made following a finding of

discrimination. Human rights cases are publicly available in legal libraries and may be accessed through standard techniques of legal research. Whatever the legitimacy of the Commission's actions, it could not be said that they made the relevant information unavailable to Mr. Statton. Mr. Statton was obviously unwilling to engage in the effort necessary to produce the information which I requested, if indeed the cases he referred to exist.

As a result of Mr. Statton's failure to submit additional Board of Inquiry jurisprudence on the issue of general damages, I confined myself to a consideration of the cases and argument presented by counsel during the hearing itself. On the basis of the extensive human rights case law submitted by counsel for the Commission it is clear, contrary to what the respondents argued, that there is a presumption of awarding both special and general damages in human rights decisions in order to fulfil the remedial and compensatory objectives of human rights legislation. (See the decision of Professor Cumming in Cameron v. Nel-Gor and the other decisions cited therein.) General damages are awarded to cover a variety of interests beyond what has traditionally been referred to as mental anguish, including the loss of the right to be free from discrimination and the injury to dignity and self-respect which flows from an act of discrimination.

The very violation of the right itself is assumed to involve an injury to dignity and self-respect which warrants an award of general damages. In any particular case an award of general damages may, of course, be increased beyond this basic amount to take into account circumstances particular to the case, including evidence of severe mental distress suffered by the complainant and any malice on the part of the respondents. However, the fact that the complainant did not offer extensive evidence to document a condition of severe depression or mental suffering does not preclude an award of general damages; it merely influences the amount of the award.

In determining the appropriate amount of the award of general damages in this case, I am aware that awards of general damages have become more generous over time for the reasons given by Professor Cumming in Cameron v. Nel-Gor, at para. 18526:

> Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not to be minimal, but ought to provide true compensation other than in exceptional circumstances, for two reasons. First, it is necessary to do this to meet the objective of restitution, as set forth above. Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the Code: It is important that damage awards not trivialize or diminish respect for the public policy declared in the Human Rights Code.

Considering the circumstances of this particular case I have concluded that the appropriate award of general damages is in the amount of $1200. This award recognizes that Mr. Rapson suffered an injury to his dignity and self-respect because of the discriminatory conduct of the respondents. It also recognizes that the discrimination he suffered was in the form of arbitrary treatment directly based upon his handicap. At the same time, however, it recognizes that the special circumstances which have justified higher awards in other cases are not present here.

There is no evidence of serious depression or psychological trauma. This is in contrast to the situation in Cameron v. Nel-Gor where the complainant suffered severe depression and withdrawal after being denied her first job out of high school because of her handicap, thus justifying, in part, an award of $2,000 in general damages. This case is also distinguishable from that of Morgoch v. City of Ottawa (1989), 11 C.H.R.R. D/80 (Ont. Bd. of Inquiry) where, in support of $6,500 award of general damages, there was testimony by the complainant's wife with respect to the husband's psychological obsession with the rejection of his application for employment as a firefighter and the adverse impact of that on his family.

Furthermore Mr. Rapson was not denied a job that was central to his long-term career plans or a significant part of his sense

of self-identity. This is in contrast to the situations in Underwood v. Board of Commissioners of Police for the Town of Smith Falls and Murphy (1985), 7 C.H.R.R. D/3176 (Ont. Bd. of Inquiry) where a complainant who had had a life-long ambition to be a police officer was awarded $3,000 in general damages; in Morgoch where the complainant was determined to become a firefighter; and in Canadian Armed Forces v. Morgan where a $2,500 award of general damages was justified by the complainant's humiliation, given his military background, at having been rejected for employment by the armed forces.

Finally, in this case counsel for the Commission did not request an award of punitive damages. Although the behaviour of the respondents during these proceedings was obstructionist and at points verging on contempt, the behaviour which forms the basis of the complaint does not clearly warrant an award of punitive damages.

Following the decisions in Canadian Armed Forces v. Morgan, Morgoch, and Underwood I have calculated the general damages according to present day standards and therefore no award of interest is appropriate. The appropriate award of general damages is therefore $1,200.

c) Total Damages

Special damages plus interest thereon having been fixed at $1,695.11 and general damages having been fixed at $1,200, the total award of damages is $2,895.11.

COSTS AGAINST THE COMMISSION

Counsel for the respondents requested an order for costs against the Commission because of the delay in bringing these proceedings and the prejudice suffered by his clients as a result. I am empowered by s. 40(6) of the Code to order costs against the Commission only when a complaint has been dismissed. As this complainant has been successful, and thus has not been dismissed, there is no basis whatsoever for an award of costs against the Commission.

ORDER

This Board of Inquiry having found the respondents Constantin (Gus) Sipsis and Stemms Restaurants Limited to be in breach of sections 4 and 8 of the Ontario Human Rights Code, 1981, as amended, in respect of the complainant, Martin Rapson, for the reasons given, orders as follows:

The respondents are jointly and severally liable to pay forthwith to the complainant, as follows:

a) special damages as compensation for lost wages in the amount of $1,121, together with interest thereon in the amount of $574.11 for a total of $1,695.11; and

b) general damages in the amount of $1,200.

Dated at the City of Toronto this 29th day of April, 1991.

C. Rogerson

Professor Carol J. Rogerson
Board of Inquiry